

ITEM:

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SUBJECT:

ADMINISTRATIVE CIVIL LIABILITY (ACL) COMPLAINT NO. R5-2005-05-01, Hilmar Cheese Company, Inc. and its wholly owned subsidiary, Hilmar Whey Protein, Inc, Merced County

BOARD ACTION:

Consideration of a Referral to the Attorney General to file an enforcement action under California Water Code Section 13350, or whether the Board should maintain the action administratively.

BACKGROUND:

Hilmar Cheese Company, Inc. and its wholly owned subsidiary, Hilmar Whey Protein, Inc., (hereafter “Hilmar Cheese”) are privately held California corporations that own and operate a Cheese Processing Plant (hereafter “Plant”) about one-half mile north of the unincorporated community of Hilmar. Hilmar Cheese discharges cheese processing wastewater from the cheese pit and the lactose pit to the “Primary Lands,” adjacent to the Plant. The discharge is regulated by Waste Discharge Requirements (WDRs) Order No. 97-206 and Cleanup and Abatement Order No. 2004-0722 (hereafter “CAO”). Since March 2001, Hilmar Cheese has also provided treated wastewater to other persons for irrigation of “Secondary Lands” near the Plant.

On 26 January 2005, the Executive Officer for the California Regional Water Quality Control Board, Central Valley Region issued Administrative Civil Liability (ACL) Complaint No. R5-2005-0501 to Hilmar Cheese Company, Inc. and its wholly owned subsidiary, Hilmar Whey Protein, Inc, Hilmar Cheese Company Properties Partnership and Kathy and Delton Nyman, dba Delton Nyman’s Farm. The ACL Complaint was later withdrawn as to Hilmar Cheese Company Properties Partnership and Kathy and Delton Nyman, dba Delton Nyman’s Farm. The ACL Complaint alleges that (1) Hilmar Cheese’s self-monitoring reports document 1,039 days of violation of the discharge effluent limit of 900 micromhos per centimeter (µmhos/cm) for EC prescribed by WDRs Order No. 97-206 for discharges to Primary Lands; (2) Hilmar Cheese’s self monitoring reports document that on those 1,039 days, Hilmar Cheese discharged 821,000,000 gallons of wastewater to the Primary Lands; and (3) on those 1,039 days, Hilmar Cheese discharged waste or caused or permitted waste to be deposited where it was discharged into waters of the state. The ACL Complaint proposes that Hilmar Cheese pay a liability of \$4,000,000 (four million dollars).

The proposed penalty is substantial. As a result, discovery in this case has been extensive and time-consuming, more commensurate with a judicial proceeding. That level of involvement will likely continue through the date of the hearing.

The Hilmar Cheese has requested 1) a one- to two-week hearing before the Board, or a three-member hearing panel, 2) the right to submit post-hearing legal briefs, 3) the right to comment on a tentative order

prepared after the hearing, and 4) the right to conduct additional discovery after the prosecution staff submits its final staff report and evidence to the Board. After the Chair denied these requests, Hilmar Cheese filed a written motion for reconsideration, to which staff must respond. The discharger also filed a motion requesting a formal hearing and assignment of an administrative law judge, and prosecution staff submitted a written opposition. In its papers, the discharger has also alleged that the Executive Officer, the Regional Board or some of its members may be biased.

Water Code Section 13350(g) allows the Regional Board to refer alleged violations to the Attorney General to recover liability in Superior Court. The Regional Board must conduct a public hearing before making the referral.

ISSUES:

- It appears that Hilmar Cheese will continue to litigate this case in a manner that might better be handled in a Superior Court. To avoid having to litigate some or all of the process, bias, and due process issues, it may be preferable to refer this case to the Attorney General for recovery of liability in a judicial setting.
- The process before the Regional Board is different from a judicial process in many ways. Evidentiary rules are relaxed in an administrative hearing; they are more formal in Superior Court. The standard of review when a Superior Court reviews an administrative decision is more deferential to the Regional Board's determination than a trial of the case. Under the administrative process, the Regional Board's prosecution team may not communicate with the adjudicatory team; in Superior Court, Board and staff would together be part of the plaintiff team, represented by the Attorney General's Office.
- As noted above, this has been an extremely intensive case in terms of staff resources. Referral to the Attorney General's office may alleviate some of the burden on Regional Board staff, although litigation would require significant dedication of staff time as well.

After the hearing, the Board may adjourn to closed session to deliberate on the decision to be reached based upon the evidence introduced at the hearing. Authority: Government Code Section 11126(c)(3).

Mgmt. Review _____
Legal Review _____

June 24, 2005
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